NOTICES OF NEW BOOKS.

A TREATISE ON THE LAW OF WILLS; embracing the Jurisprudence of Insanity, the effect of Extrinsic Evidence, and the Creation and Construction of Trusts as appertaining to Wills, with Forms and Instructions for preparing Wills. By ISAAC F. REDFIELD, LL.D., late Chief Justice of Vermont. Boston: Little, Brown & Co. Shp. $7.50.

Seldom has the examination of an elementary treatise of the law given us so much satisfaction as in the case of the present volume. Having been associated with the author many years as a member of the Supreme Court of Vermont, we were prepared to expect a most valuable treatise to the American lawyer upon this important branch of the law, and our expectations have been fully realized. This volume has evidently been carefully prepared and lucidly arranged so as to render the matter exceedingly accessible. As a text-book it must prove a standard work, and to the profession an immense saving of labor. The various and leading cases upon the several topics discussed seem to have been referred to, and the very *nut* of the cases extracted and digested with great care and accuracy, and presented to the reader with precision.

Where there has been a conflict in adjudged cases upon any point, the different classes of cases are so presented as to show at once the principle involved in and attempted to be maintained by the case; and in a manner to enable the intelligent lawyer or judge easily to form a just opinion as to the weight of authority. The cases are brought down to the most recent period of time, and we apprehend that the book will take its place at once as a standard work, and among American lawyers, at least, will occupy the first rank among treatises discussing these important topics. The mechanical part of the volume is good; and it is to be hoped that the author may be well compensated for his great and valuable services in the accomplishment of so laborious and so faithful a work.

M. L. B.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF WISCONSIN. By PHILIP L. SPOONER, Official Reporter. Vol. XV. Madison, Wisconsin: Attwood & Rublee. 1864.

This volume, for which we are indebted to the courtesy of the learned reporter, is made up of cases decided two years ago, but many of them are still of considerable interest to the profession.

The Supreme Court of Wisconsin has of late been much engaged in the adjudication of causes relating to state and municipal taxation, the rights of married women, and of creditors as against their separate property, and the validity of the mortgages given for the construction of

various railroads in the state, called the Farm mortgages. This volume contains cases on all these subjects, in which the law is developed and applied with much industry and learning. It is especially gratifying to note the courage with which the court persists in holding even the scales of justice in the class of cases last mentioned, in which are arrayed on one side foreign creditors, and on the other, a powerful domestic interest, the former clamoring for payment of bonds which the latter had, perhaps, unwisely made and secured upon their homesteads, and from the burden of which they now seek to be exonerated. See *Oatman* vs. *Bond*, p. 20.

One decision of the court, however, or series of decisions, or of indecisions, rather, culminating in this volume, in the case of *Kneeland* vs. *The City of Milwaukee et al.*, pp. 454, 691, it is impossible not to criticise, and we do so at a length which only the great importance of the subject would justify.

In 1855, in the case of *Milwaukee and Mississippi Railroad Co.* vs. *The Supervisors of Waukesha County*, the court had held, that an act of the legislature of the year before, requiring railroad and plank-road companies to pay one per cent. on their gross earnings, in lieu of all taxes, was constitutional: 9 Wisconsin Rep. 449. This was upon the construction of sec. 1, art. 8 of the Wisconsin Constitution, providing, that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe;" the obvious meaning of which is, as we think, that the legislature shall have power wholly to exempt from taxation such property as they may see fit, but that upon all property in the state not declared exempt, the mode and rate of taxation shall be uniform. In this view of the constitutional provision, it seems, the Act of 1854 was clearly unconstitutional, and to this opinion the court seemed afterwards to come, for in four subsequent cases, involving directly a construction of the same clause of the constitution, the court departed from its decision of 1855, and declared legislative acts authorizing a similar discrimination in taxation, in favor of certain classes of property, to be unconstitutional: *Knowlton* vs. *Supervisors of Rock County*, 9 Wis. 410; *Weeks* vs. *City of Milwaukee*, 10 Id. 242; *Attorney-General* vs. *Winnebago Lake and Fox River Plank-Road Co.*, 11 Id. 35; and *Kneeland* vs. *City of Milwaukee*, 15 Id. 454.

These cases were decided, the first in 1859, the second and third in 1860, and the fourth at the January Term, 1862, and in them, as we think, the court stood on solid ground. It certainly did, if the several acts considered in them be conceded to impose a tax at all.

It was contended on one side that they did not impose a tax, but that the true construction of them was, that the payments to be made to the state in lieu of taxation, were in the nature of excise, or, perhaps, of a

bonus for exemption from taxation. This, however, was not the view of the court, by which the contrary was expressly held.

At the June term of the court, 1862, however, a motion was filed for a rehearing of the last cause above named, *Kneeland* vs. *The City of Milwaukee*, and the motion was granted, upon the consideration, that the effect of their late decision would be disastrous to important interests in the state, and that, therefore, the court ought to recede from its position.

DIXON, C. J., said, in allowing the motion: "The interests involved are immense, and the consequences of adhering to our late decision beyond calculation. The taxes for a series of years, in a great state like this, cannot be annulled, and every proceeding connected with and depending upon them overturned, without a shock, which must be felt by every property-owner and citizen of the state. * * * But this is not all. I do not see how the errors of the past are to be corrected, except by the levy of a new tax to make up all former deficiencies. * * * We are then brought to this: the tax-payers of to-day must come forward and pay into the public treasuries, state and county, and in many cases city and town, the unpaid taxes of the past seven years, with the fees, charges, and interest. This cannot be done. The people cannot discharge such an enormous burden in any one year. Its collection would be impossible. It might be made in three, four, or more years, but not in a shorter time. Is this court authorized in view of all the facts; can we, consistently with duty, inflict such a burden upon the people of the state? I think not."

That a consideration of consequences must have been the real reason for granting the motion appears certain, because the court avowed, that its opinion on the constitutional question had undergone no change. The same judge said: "I am in great doubt and perplexity upon the subject. My views of the constitution remain unchanged. I never had and never can have any doubt about that." The ground, however, upon which the allowance of the motion was put by the court was, that it ought to adhere to former adjudications. But which of the varying decisions should it adopt as a guide? One would suppose, that in going back for a decision to rest upon, the court would select one that, first, should be right, and, secondly, most conformable to the general course of previous adjudications. But no; the decision selected was that of 1855, made seven years before; four times, within the last three years, solemnly pronounced to be erroneous. And selected for what reason? Because that decision, it was said, had been adopted by the people and petty officials throughout the state, as embodying a final settlement of the question! Because great interests had grown up under an erroneous view of the constitution, the maxim *stare decisis* required the court to adhere to the decision announcing that view, rather than to the more recent ones which rightly interpreted that instrument.

Accordingly, the court announced its inclination to return to the ruling of 1855, and finally did so, the opinion subsequently given formally adopting it as the settled law of the state: *Kneeland* vs. *City of Milwaukee*, 15 Wis. 691.

But to what extent did the court intend that this decision should affect the four adverse to it, previously rendered? Unfortunately the record of the court here also is not entirely creditable. As if to demonstrate that, in their late decision, they were influenced by no considerations proper for judicial cognisance, the case of *Knowlton* vs. *Supervisors of Rock County*, involving one of the four adverse decisions, was brought a second time before the Supreme Court by appeal, and the sole question raised was, whether the court intended by its late action to overrule its decision in that case, reported in 9 Wis. 410.

In their opinion, 15 Wis. 600, the court say that such was not their intention. The motion for a rehearing in *Kneeland* vs. *The City of Milwaukee*, they say, "was granted upon the ground that there had been a former decision of this court sustaining the validity of the very law in question, which we did not feel at liberty to overturn after it had been so long acted on. But we shall follow that decision no further than the exact point decided; that is, to sustain the validity of the Act of 1854 taxing rail or plank roads." So, there was to be one constitutional construction for the property of railroads and plank-roads and another for other property.

One inducement of the court to retrace its steps thus, as we gather from the opinion of DIXON, C. J., granting the rehearing, was, that the legislature was about to assemble "on that very business," and could, by a repeal of the obnoxious laws, or by other substantial legislation, remedy the evils deplored by the court, and which it felt bound temporarily to avert, by an unconstitutional decision. The legislature met, but wholly failed to do what was expected of it.

As in all legislatures, the corporations interested in securing exemption from the public burdens were well represented in it. The lawgivers, we are told, reasoned, "that there could be no necessity for legislation; the Supreme Court had just announced its decision sustaining the validity of the act touching the taxation of rail and plank road property; the exemption being valid, why should they alter or repeal the law?" and indeed why should they? A tribunal, made the special guardian of the constitution, had—not winked at, for that implies an occasional closing of the eyes, so as not to witness, but—engineered, actively and openly, a violation of that instrument; and, while it admitted, that its act was a flagrant usurpation, legislated judicially for the benefit of those corporations. To expect a body made up largely of their representatives to

relieve the court from its dilemma, would be to look for a disregard of the interests of their constituents, not usual in our legislators.

One more fact must be stated, not to cast ridicule upon the court, but that the whole case may be understood.

The court having returned to the rule established in 1855, in the case of *Milwaukee and Mississippi Railroad Co.* vs. *Supervisors of Waukesha County*, one would conclude it was well known what the grounds and particulars of the decision in that case were. But it was not known, when either of the subsequent cases was decided, nor is it now known. If an opinion was ever drawn up and filed in that case, which is declared doubtful, it soon disappeared, and has never been found or published; and the judges, such of them as survived in 1859, when that decision or supposed decision was first overruled, in the case of *Knowlton* vs. *The Supervisors of Rock County*, disagreed, *toto cœlo*, as to the grounds on which it was rendered. (See opinion of DIXON, C. J., and COLE, J., dissenting, 9 Wis. Rep. 410.) All that is known is, that upon consideration so slight, that the decision arrived at did not fix itself in the memory of the judges, the decree of the court below sustaining the validity of the Act of 1854 was affirmed. Whether it was affirmed on the ground that the payments required of rail and plank roads were payments of a tax, or of a *bonus* for exemption from taxation, the judges concerned are not agreed.

Our purpose in noticing this series of cases is, to protest against the doctrine they tend to establish. If a constitution or a statute clearly prescribes a rule of action or of property, a court of law can, in no conceivable circumstances, dispense with or abolish it. To do so, is within the sphere only of the convention or of the legislature. It is the business of a judicial tribunal to pronounce what the law is; within the domain of expediencies, where the question is, what the law ought to be, it has no right to expatiate.

We expect occasionally from tribunals constituted as ours are, bad law; but a solemn adjudication, like the one we are considering, involving an admitted, if not an intended breach of the constitution, out of considerations of pecuniary consequences, is to be stamped as not only bad law, but bad morals. And the case, in our opinion, is not altered by the fact, that powerful municipal or moneyed corporations have thought fit to select from a series of conflicting decisions, as a guide for their conduct, that one which, although confessedly unconstitutional, was yet deemed from its general injustice to be the most advantageous to themselves.

One remark further: If a court is bent upon doing an unconstitutional act, it is better to do it by wrong constructions, than by right constructions, contemptuously disregarded. In the one case it says: "It is not

in the constitution;" in the other, "It is in the constitution, we admit, but we will not obey it." It was in the power of the Wisconsin court to decide, as was plausibly contended by counsel, that the payments required under the different acts we have mentioned, were not payments of a tax, but of excise, or of a bonus for exemption from taxation. Had it so decided, men might, it is true, have doubted their law, but they could entertain some respect for the consistency, if not for the conscientiousness, of the judges.

But as it is, the constitution is trampled under foot, and the precedent established, that the provisions of that sacred instrument may be disobeyed, whenever the public interest, as conceived in the judicial mind, may seem to require it. J. A. J.

A Treatise on the American Law of Real Property. By Emory Washburn, LL.D., Bussey Professor of Law in Harvard University, Author of a Treatise on the American Law of Easements and Servitudes. 2 Vols. Second Edition. Boston: Little, Brown & Co. 1864.

This second edition of Professor Washburn's valuable work upon real property will be exceedingly welcome to the profession; both because it gives them the full revision and perfected labors of the author, and also because it is a work of great and almost indispensable value to every department of the profession, to the practitioner no less than to the student.

The subject of the title and conveyance of real estate, is always one which must occupy a large and important place in the study, as well as the practice, of the profession. The best English books upon the subject, Cruise, Preston, Earne, and others, were unfortunately incumbered with a large share of the refinements and antiquated learning upon the topic, much of which is now no longer of any practical interest even in England, and which was never of much importance here except as matter of curious inquiry.

The subject is a good deal simplified in Professor Greenleaf's edition of Cruise. But something more in the same direction was still demanded to meet the wants of the profession in this country. This, we believe, is now most thoroughly and happily accomplished by the present work of Professor Washburn. The present edition has received considerable additions from the author's hand, and portions of the work, and especially the index, have been entirely recast.

The new matter is generally upon very important practical questions. In the first volume, page 414 [400], we have nearly two pages of condensed matter upon the effect of a license to make erections upon land, and how far the same is recoverable after it has been, in part, or wholly, executed. Upon the subject of mortgages we find entire sections of new